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May 30, 1996

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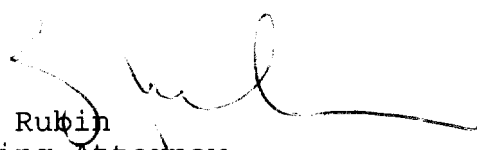
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Re: Implementation of the Local Competition
Provisions in the Telecommunications
Act of 1996 - CC Docket No. 96-98.

Dear Secretary Caton:

Enclosed please find the original and sixteen copies of
the Reply Comments of the New York State Department of Public
Service in the above-referenced proceeding.

Respectfully submitted,


Penny Rubin
Managing Attorney

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Before the Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

REPLY COMMENTS
OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Implementation of the Local Competition) CC Docket No. 96-98
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**REPLY COMMENTS
OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE**

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) hereby submits its reply comments in the above-referenced proceeding. Our Initial Comments answered most of the arguments raised by parties supporting FCC preemption of state regulation. Our reply, therefore, is limited to specific points requiring elaboration.

Parties arguing for rules that would preempt the states rest their jurisdictional argument on the intent of Congress to provide for specific national ground rules to govern the transition to local competition (e.g., National Cable Television Association Comments at 3-6). Congress did intend there to be a national policy; however, that policy is defined in the Act. Congress assigned discrete responsibilities to the Commission, the states, and competitors in implementing that policy.

The plain language of the Act and its legislative history, as discussed in NYDPS's Initial Comments, show that Congress did not intend a wholesale revision of state and federal jurisdiction to effectuate its new policy. Moreover, §§251 and 252 are aimed at local competition, an area reserved to the states under §152(b) of the 1934 Act.¹

Even if §§251 and 252 apply to both intrastate and interstate communications, Congress did not evidence the

¹ This does not mean, however, that network elements subject to unbundling and pricing for interconnection purposes that are subject to Part 36 separations would no longer be treated as interstate elements. It is those jurisdictionally intrastate costs of unbundled network elements which lie exclusively within the purview of the states as mandated by §§251, 252 and 152(b).

slightest indication that the FCC could use the specific rulemaking authority granted to it by §251(d) to intrude on the states' jurisdiction over intrastate matters as expressly preserved by §152(b), except as explicitly stated in the Act.¹ The Act is also unambiguous in reserving intrastate pricing authority to the states. Moreover, the Commission's authority under §253 may not be used to preempt state actions implementing §§251 and 252.

Finally, New York's competitive policies are consistent with the Act, as are those of many other states, and therefore rather than engage in needless dispute, the Commission, the states, and the competitors would be well served if the Commission adopts a simple and responsible policy framework.

I. State Authority Over Intrastate Services
Including Pricing, Is Preserved Under the Act

Various parties argue that §§251 and 252 apply to both intrastate and interstate telecommunications (e.g., CompTel at 22).² Their position begs the question of whether §251(d)(1)'s call for FCC regulations "to implement the requirements of this section" authorizes Commission preemption of intrastate matters, as tentatively concluded in the NPRM (§§37, 117).

In Louisiana PSC v. FCC, 476 U.S. 353 (1986), AT&T and its co-respondents made an argument very similar to CompTel's

¹ In our Initial Comments we agreed that the Commission does have the legal authority, in limited instances, to establish minimum requirements. NYDPS Initial Comments at 8.

² If that analysis is found to be correct, for all of the reasons contained in our Initial Comments, state authority over the intrastate aspects remains intact. Moreover, under such a reading, the Commission's authority to act if a state commission fails to act under §252(e)(5) must be read to mean that to the extent state law does not provide a state commission with jurisdiction over interstate telecommunications, the Commission would be forced to step in and assert its authority only over the interstate aspects associated with arbitration, mediation or negotiation.

attempted use of §251(d)(1). Just as CompTel argues that §251(d)(1), a neutral congressional call for Commission action, should be read as overriding §152(b)'s preservation of state authority¹, AT&T claimed "there is no way that [§152(b)(1)] can be read to override the specific congressional determination [§220] to preempt state authority over depreciation".² In rejecting these claims, the Supreme Court noted, "given the breadth of §152(b), and the fact that it contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction ('[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service...'), we decline to accept the narrow view urged by respondents . . .". 476 U.S. 353, 373.³ Thus, Congress's retention of §152(b) clearly defeats CompTel's claim that §251(d)(1) rules may preempt the states' regulation of intrastate matters, unless explicitly directed in the Act. (See also, §601(c)(1)).

We take no comfort in the conclusion that local exchange telephone rates remain subject to applicable state laws and requirements (Sprint at 9). Unless the Act explicitly permits preemption, the Commission is denied jurisdiction with respect to charges, classifications and practices for or in

¹ Various other respondent intervenors also argued that §152(b) had to give way to Congress's directive in §151 that the Commission preserve the interstate network. Brief for GTE Service Corp. and Affiliated Telephone Companies, Appellees-Respondents at 8-10, Louisiana PSC v. FCC.

² Joint Brief of Listed Private Respondents at 31, Louisiana PSC v. FCC.

³ Moreover, MCI's claim that the specific controls the general and therefore §§251 and 252 supersede §152(b) is incorrect (MCI at 8). The court in Louisiana concluded that §152(b) is a specific denial of Commission jurisdiction.

connection with intrastate communications.¹ Therefore, given the absence of language in §§251 and 252 overriding §152(b), there can be no basis for reading those statutes as crafting an exception to §152(b)'s specific jurisdictional bar. That is, as noted above, Congress did not see fit to amend §152(b); nor did it expressly provide for Commission authority over intrastate rates regardless of whether those rates are charged to end users or competing local exchange carriers. The Supreme Court rejected the argument that the Commission's authority over depreciation under §220 of the 1934 Act constituted an unambiguous grant of power to the FCC exclusively to regulate depreciation. (Louisiana at 366, 376-77). And, just as depreciation methods are central to local ratemaking, so too are the pricing requirements being proposed in this NPRM.

Furthermore, as we stated in our Initial Comments, the Act is unambiguous in reserving intrastate pricing under §252(d) to the states. The plain language of §252(e)(2)(b) explicitly directs the state commissions to apply the pricing requirements contained in §252(d) in arbitrating rate issues regarding interconnection, services, or network elements. Conspicuously absent is any reference to Commission pricing regulations.

In contrast, the Act makes clear in §252(c)(1) that the states are required to take into account the Commission's regulations under §251 in arbitrating other aspects of interconnection. Therefore, if Congress had intended to give the

¹ In addition, if Congress had intended that the Commission's rulemaking authority apply to all actions required in §251, the solution would have been simply to state that the Commission's §251(d) rulemaking authority applies to all actions necessary to establish all regulations to implement the requirements of this section. Instead, the Commission is directed to implement only those requirements over which it specifically has authority, as discussed in our Initial Comments.

Commission authority over pricing, it would have been specific, as it was in various other provisions of the Act.¹

II. The Commission's Authority Under §253 May Not Be Used To Preempt State Actions Implementing §§251 and 252.

MCI's view that any state legal requirements inconsistent with the Commission's regulations under §§251 and 252 would be preempted under §253 is incorrect (MCI at 7-8). For all of the reasons we have articulated, the Commission's role is limited under §§251 and 252, and therefore, its authority under §253 may not be used to preempt state actions implementing §§251 and 252. If state action is to be challenged, Federal district court, and not the FCC, is the venue assigned to aggrieved parties.

The Commission's §253 authority is limited to those instances where state activity constitutes a "barrier to entry," taking into account specific state authority to set reasonable terms and conditions for new entrants. Moreover, to establish a violation of §253, the "FCC bears the burden of justifying its entire preemption order." People of the State of California v. F.C.C., 905 F.2d 1217, 1243 (9th Cir. 1990). Adoption of MCI's theory that any state requirement inconsistent with §§251 and 252 would be preempted under §253 effectively would eliminate the denial of Commission authority under §152(b) and would eviscerate the enforcement mechanisms adopted under the Act.

III. New York's Policies Are Consistent With The Act

In our initial comments, we explained why the interconnection compensation framework adopted by the NYPSC is

¹ To the extent that §§251 and 252 apply to both intrastate and interstate communications, the Commission's §208 complaint authority would apply only to interstate communications. Any other reading would allow parties to circumvent the Act's mandate (which violates the Eleventh Amendment) that appeals of state decisions be brought to Federal district court. §252(e)(6).

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consistent with the Act. Two commenters have asserted that it is not, and therefore we will respond to the comments of MCI and Teleport Communications on this point.

MCI, at page 47 of its comments, states that the compensation framework (known as "pay or play") is non-reciprocal, and it contends that under the arrangement, the incumbent LEC is authorized to charge some entrants rates that "far exceeded additional [termination] costs while those entrants were not allowed to recover any of their costs." On the contrary, as discussed in NYDP'S initial comments, all local exchange carriers receive reciprocal compensation for the termination of traffic on their networks. The compensation varies depending on the service provided by the carrier. Niche carriers, which do not provide the full range of local exchange services, receive a lower rate of compensation. New entrant full-service local exchange carriers receive and pay the same compensation to other carriers as the incumbent LECs, like New York Telephone. The Act's requirement for reciprocal compensation clearly does not contemplate that the compensation be identical; nothing in the Act prohibits charging different prices for different services.

Teleport Communications, Inc. argues that the New York framework violates the Act because, it contends, a state's universal service support mechanisms must be explicit. The Act, however, contains no such requirement, and the compensation scheme cannot be claimed to be inconsistent with the Act on that basis either. In fact, the section of the Act cited by Teleport in support of its assertion (§254(e)) applies only to the Federal Universal Service Fund, which is yet to be established, while §254(f) specifically permits the states to develop their own mechanisms for universal service support, and does not provide that they must take any particular form.

The National Cable Television Association claims the NYPSC requires new entrants to resell their services at wholesale

rates, and that new entrants "must file cost studies if their rates are significantly different from those of New York Telephone" (NCTA at 24). This is incorrect. The NYPSC has, in the context of a review of its statewide resale policy, asked new entrants to show cause by July 1, 1996 why they should not offer their services for resale. Regardless of whether new entrants agree to file wholesale rates or not, the NYPSC has not required new entrants to file cost studies to support wholesale rates.

IV. An Overall Framework To Assess Public Interest Is Essential

In their comments, several parties suggest that the Commission adopt overarching principles to guide its decisions in this proceeding.¹ NYDPS agrees. The Commission's resolutions of the myriad issues and questions raised in the Notice will better serve the public interest and implement Congressional intent in a "comprehensive, consistent, and expedited fashion" (Notice ¶3) if made within the context of a simple and responsible policy framework. We believe that it is imperative that the Commission establish a framework of overarching principles to follow in resolving each and every piece-part of the Act's implementation to maximize the public benefits intended by the Act. That framework should be grounded in the understanding that ultimately the intended beneficiaries of the Act is the public. To that end, we commend to the Commission the following overarching principles:

1. **All regulatory actions related to implementation of the Act should maximize the availability of real competitive alternatives to all customers**

The primary thrust of the Act is to ensure that the nation's telecommunications markets, and primarily the local exchange market, are fully and effectively opened to competition. We believe that full and effective competition can only be achieved through the availability of real choice to the maximum

¹ See, e.g., MFS (at 2-5) and Frontier (at 3-5).

consumer base, and we believe that all regulatory actions should be aimed at promoting that real choice.

Today there exist myriad forms of nascent local competition and still others will appear tomorrow. All represent steps toward the goal of providing real competitive choice to all consumers. The task at hand is to ensure that all forms of competition are enabled equally and none is disadvantaged by actions taken on others.

The primary focus today is on two basic forms of competitive entry - facilities-based competition and competition through resale of existing services. We believe that both are important in the development of real competitive choice, although ultimately facilities-based competition holds the most promise for full and effective competition in the future. Accordingly, care should be taken to ensure that actions taken in one arena do not adversely affect development of competition in the other, with special emphasis on ensuring that actions taken in the resale arena do not discourage the deployment of facilities-based alternatives. Carrier-to-carrier prices should be based on forward-looking costs that promote the goal of efficiency

2. Regulatory action related to implementation of the Act should enhance the effectiveness of customer choice

Bringing a full spectrum of competitive alternatives to the public is only the first half of the equation for full and effective competition. Equally important is the ability of customers to exercise their power to influence market responses to their demands. Regulators must ensure that constraints are not placed on consumers in the exercise of their choice. For example, a major concern here is the retail price structure that will prevail in a fully competitive telecommunications environment. That price structure should be determined by free-working consumer demand, not dictated by the telecommunications industry or its governmental regulators. Care must be taken at

this critical juncture that regulatory actions in the area of carrier-to-carrier pricing not force a specific retail rate structure on the market and thereby restrict the free workings of competition. If one competitor wants to give "free" service on weekends, another "free" monthly basic service, or yet another other price variations, the fact that carrier-to-carrier charges are higher, lower, or different should not become a constraint except to the extent that they may be anticompetitive (e.g., tying arrangements).

3. Regulatory action should not be the cause of increases in basic telephone rates

While the issue of potential rate increases is not raised directly in this Notice, some proposed resolutions of pricing issues create pressure to increase rates. We do not believe Congress, in passing the Act, intended there to be adverse rate impacts on customers stemming from its implementation, particularly on residential consumers. In fact, §254 of the Act requires consideration of funding methods to maintain affordable rates in circumstances where the transition to a competitive market might yield a different result. With such protections within it, the Act was heralded as bringing the benefit of lower prices and more choice to the public. It is imperative, therefore, that the Commission not take any pricing actions in this rulemaking that are not fully integrated with other related proceedings to reform access charges and establish competitively neutral Universal Service funding mechanisms so that in the aggregate, basic local rates are not increased in the name of bringing "benefits" of competition.

As a corollary to the above framework we further recommend that the Commission adopt a general approach of simplicity. The overall regulatory direction embodied in the Act is toward a system of fewer rules and regulations and less government oversight. Indeed, the Notice refers to Senator

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Pressler's comment that progress has been stymied by a morass of regulatory barriers. (§2) In other words, **less is better than more** and **simple is better than complex** should be the standards in meeting the above goals in implementing the Act.

We believe that adherence to the above framework would greatly simplify resolution of the many details that need to be addressed to implement the Act. We further believe that to be faithful to such a framework, the Commission must maintain flexibility for itself, for the states, and for the industry. To the extent that the Commission promulgates rules to guide or direct the states or simply for its own application where the Act requires, those rules or guidelines should provide the flexibility needed to respond fairly to differing and changing conditions.

CONCLUSION

For all of the above reasons, the arguments of all parties advocating Commission preemption of state action implementing §§251 and 252 should be rejected, New York's interconnection framework should be deemed consistent with the Act, and the principles suggested herein should be incorporated into the framework used to implement the Act.

Respectfully submitted,


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Dated: May 30, 1996
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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing "Reply Comments of the New York State Department of Public Service" in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - CC Docket No. 96-98 in accordance with the requirements of the Rule of Procedure.

Dated at Albany, New York, this the 30th day of May 1996.


Karen H. Kovacofsky

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